

MAR 16 1978

MICHAEL RUBAK, JR., CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1298

LAWRENCE S. KRAIN,

Petitioner,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,  
a corporation;

CHARLES YOUNG, individually and as  
Chancellor of the University of  
California at Los Angeles;

SHERMAN M. MELLINKOFF, individually and  
as Dean of the University of California  
at Los Angeles School of Medicine;

DAVID H. SOLOMON, individually and as  
Chairman of the Department of Medicine  
of the University of California at  
Los Angeles School of Medicine;

RONALD M. REISNER, individually and as  
Chairman of the Division of Dermatology  
of the University of California at  
Los Angeles Medical Center,

Respondents.

---

PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

LAWRENCE WILLIAM STEINBERG  
315 South Beverly Drive  
Beverly Hills, CA 90212  
(213) 553-6383

Counsel for Petitioner

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1977  
No. \_\_\_\_\_

LAWRENCE S. KRAIN,

Petitioner,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,  
a corporation;

CHARLES YOUNG, individually and as  
Chancellor of the University of  
California at Los Angeles;

SHERMAN M. MELLINKOFF, individually and  
as Dean of the University of California  
at Los Angeles School of Medicine;

DAVID H. SOLOMON, individually and as  
Chairman of the Department of Medicine  
of the University of California at  
Los Angeles School of Medicine;

RONALD M. REISNER, individually and as  
Chairman of the Division of Dermatology  
of the University of California at  
Los Angeles Medical Center,

Respondents.

---

PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

LAWRENCE WILLIAM STEINBERG  
315 South Beverly Drive  
Beverly Hills, CA 90212  
(213) 553-6383

Counsel for Petitioner

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I THE DECISION IN THIS CASE IN THE LOWER COURTS ENCOURAGING BROAD EXERCISE OF ABSTENTION BY FEDERAL COURTS CONFLICTS WITH THE VIEW OF THE QUESTION TAKEN BY THE SEVENTH CIRCUIT, WHICH IS BEING REVIEWED BY THIS COURT	6
II THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE SET OUT IN THE <u>COLO- RADO RIVER CASE</u> , AND OTHER CASES <u>IN THIS COURT</u> , THAT STRONG AND WELL-ACCEPTED REASONS MUST EXIST TO JUSTIFY ABSTENTION OF A FEDERAL DISTRICT COURT	10
CONCLUSION	14
APPENDIX	OPINION United States Court of Appeals For The Ninth Circuit December 19, 1977

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Calvert Fire Insurance Co. v. Will 560 F.2d 792 (CA-7 [1977])	7-9
Colorado River Water Conservation District v. United States 424 U.S. 800 (1976)	8, 10-13
County of Alleghany v. Frank Mushuda Co. 360 U.S. 185 (1959)	13
Hicks v. Miranda 422 U.S. 332 (1975)	4
Younger v. Harris 401 U.S. 37 (1971)	4
<u>Statutes</u>	
28 U.S.C.A. § 1243(1)	2
Civil Rights Act 42 U.S.C.A. § 1983	2, 3, 5
Family Education Rights and Privacy Act of 1974 20 U.S.C.A. §1232(g)	3, 4, 6

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1977

No. \_\_\_\_\_

LAWRENCE S. KRAIN,  
Petitioner,

vs.

REGENTS OF THE UNIVERSITY  
OF CALIFORNIA, et al.,

Respondents.

---

PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

The petitioner Lawrence S. Krain  
respectfully prays that a writ of certio-  
rari issue to review the judgment and  
opinion of the United States Court of  
Appeals for the Ninth Circuit entered in  
this proceeding on December 19, 1977.

OPINION BELOW

The Memorandum Opinion of the Court  
of Appeals, for non-publication, appears  
in the Appendix hereto. It is understood

that no opinion was rendered by the District Court for the Central District of California.

#### JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 19, 1977. This petition for certiorari is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

#### QUESTION PRESENTED

Where jurisdiction of the federal district court exists because of claims under the Civil Rights Act (42 U.S.C.A. § 1983) diversity of citizenship and other federal bases, can a district court, where there is no compelling reason for refusing to accept jurisdiction, properly enter a judgment of abstention on the basic ground that a state court action covering some of the same subject matter has previously been filed?

#### STATEMENT OF THE CASE

The jurisdiction of the district court was invoked on several bases. One was diversity of citizenship, with the petitioner being a citizen of Illinois and the individual respondents being citizens of California, with the corporate defendant being a California corporation.

Federal jurisdiction was based also upon the Federal Civil Rights Act and upon the Family Educational Rights and Privacy Act of 1974.

The present action was filed on July 1, 1975, in the United States District Court for the Central District of California by petitioner against the Regents of the University of California and individuals connected with that university. There were six counts for (1) declaratory judgment; (2) denial of Civil Rights; (3) taking of property without due process; (4) denial of equal protection; violations of Family Educational Rights and Privacy Act of 1974. A year earlier, on July 1, 1974, petitioner had filed an action against respondents in the Superior Court of the



State of California for the County of Los Angeles, for breach of contract, injunctive relief, and denial of constitutional rights.

However, the state action did not have causes of action for the denial of civil rights, violations of the Family Educational Rights and Privacy Act of 1974, declaratory relief, or violations of rights occurring after July 1, 1974.

A preliminary injunction was denied in the state action on July 26, 1974. The action itself has not gone to trial.

After an informal hearing in the present case on July 2, 1975 before Honorable Warren J. Ferguson, United States District Judge, Judge Ferguson declined to take jurisdiction and entered a Judgment of Abstention under Younger v. Harris, 401 U.S. 37 (1971) and Hicks v. Miranda, 422 U.S. 332 (1975).

Petitioner is a medical doctor. Petitioner received and accepted an appointment as a resident in the field of dermatology at the University of California at Los Angeles School of Medicine. The residency

was a three year program; petitioner satisfactorily completed two years of residency, but was not renewed for the third year. Petitioner accepted a fellowship at Harvard Medical School - Massachusetts General Hospital, but was later dismissed therefrom, allegedly because of unfavorable recommendations by respondents. Petitioner sought but was denied readmission at U.C.L.A. to its residence program.

Count Two of the federal complaint alleges a cause of action under the Federal Civil Rights Act, 42 U.S.C.A. § 1983, which of course is not available in the state courts. This cause of action alleges importantly inter alia that the administrative procedure under which petitioner was terminated from his medical residency violated the rights of petitioner under the Civil Rights Act in specific respects. These, generically, relate to denials to petitioner of the right of due process, including but not limited to various deprivations of both notice and the opportunity to be fairly heard.

There is a count under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C.A. § 1232(g). Naturally, this is a federal matter not cognizable in the state courts; and there was no comparable count in the state court action. The Act is very new, and it does not appear that there are yet any private suits thereunder. Petitioner urges that under the law there is room for private suits. That is a question which, as yet undecided, would be very appropriate for determination by this Court at this time.

#### REASONS FOR GRANTING THE WRIT

- I. THE DECISION IN THIS CASE IN THE LOWER COURTS ENCOURAGING BROAD EXERCISE OF ABSTENTION BY FEDERAL COURTS CONFLICTS WITH THE VIEW OF THE QUESTION TAKEN BY THE SEVENTH CIRCUIT, WHICH IS BEING REVIEWED BY THIS COURT.
- 

The lower courts have in this present case taken the view that abstention by a federal court is amply justified in situations where significant overlap between the claims presented in the federal action

and claims in a state court action between the same or similar parties.

But such view is by no means universal in the federal courts, and is not consonant with the general principles governing in this field.

Thus, in the case of Calvert Fire Insurance Company v. Will, 560 F.2d 792 (CA-7 [1977]), the Court of Appeals for the Seventh Circuit granted a writ of mandamus to require the United States District Court for the Northern District of Illinois to adjudicate a federal claim for damages and equitable relief under the Securities and Exchange Act of 1934. The case had been stayed by the district court in deference to state court proceedings.

This Court has granted, on January 8, 1978, certiorari to review that decision. The number of that case in this Court is 77-693.

Thus there appears to be a conflict between the Courts of Appeals with regard to this significant question of federal jurisdiction. This conflict requires to be, and is in the process of being, determined

by this Honorable Court.

We amplify briefly. Specifically, the Seventh Circuit, in the case of Calvert Fire Insurance Company v. Will, 560 F.2d 792, has interpreted the Colorado River Case to mean that, where there is contemporaneous exercise of concurrent jurisdiction by a state court and a federal court, "....the pendency of a state court action is not a bar to an action in a federal court involving the same issues." (Page 795).

Holding that "the district court should not have deferred to the state court on grounds of federalism in light of Colorado River...." (Page 797), the Seventh Circuit granted a writ of mandate against the district court requiring it to proceed with adjudication of the federal claims.

On the other hand, the Ninth Circuit in the instant case has given a very different interpretation to the Colorado River case, and employed it as a specific authority (and the only Supreme Court authority) for upholding the district

court judgment of abstention because of the pendency of a like and concurrent state proceeding. (See slip opinion reproduced in the Appendix hereto).

Clearly there is a substantial degree of conflict between the views of the Ninth Circuit and those of the Seventh Circuit with respect to the important question here involved. And, as indicated, this Court has already granted certiorari to review the judgment of the Seventh Circuit in Calvert. This conflict, and the existing grant of certiorari in Calvert, strongly justify the granting of certiorari in the instant case as well. This Court might well wish to have the two matters argued together; alternatively, after granting certiorari the Court might wish to delay determination of the present case until Calvert is finally determined.



II. THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE SET OUT IN THE COLORADO RIVER CASE, AND OTHER CASES IN THIS COURT, THAT STRONG AND WELL-ACCEPTED REASONS MUST EXIST TO JUSTIFY ABSTENTION OF A FEDERAL DISTRICT COURT.

---

The federal rule and the rule enunciated by this Court is that where jurisdiction of a federal district court exists, it must be exercised on cases brought before it unless well-defined countervailing reasons exist. That rule seems not to have been observed appropriately by the lower courts in the present case; the judgment of abstention was not based upon any important countervailing reason for refusing to decide the matter in the federal courts.

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), is in rather sharp conflict with

the judgment of abstention in the present case.

In Colorado River, it is true that the holding of this Court in light of a pending state action covering the same subject matter, actually affirmed a dismissal of the federal action to obtain a determination of rights in waters located in Colorado Water District No. 7. However, this was regarded by the Court as an unusual situation, wherein specific federal legislation had given consent to such controversies involving federal water rights, and wherein there were other special circumstances including extensive involvement of state water rights, and the 300-mile distance between the District Court in Denver and the state court in Division 7.

Very importantly, this Court in Colorado River carefully reviewed and

specifically held inapplicable the doctrine of abstention, in any of its three general categories:

(a) In cases presenting a federal constitutional question which might be mooted or differently presented through state court determination of state law;

(b) In cases presenting difficult questions of state law bearing on policy problems of substantial import whose importance transcends the result of the case.

(c) In cases where generally, federal jurisdiction is invoked to restrain state criminal proceedings; or certain restraining state nuisance proceedings with regard to obscene film theaters; or restraining collection of state taxes.

Even while upholding the federal court dismissal, the majority opinion in Colorado River emphasized "... that we do not overlook the heavy obligation to exercise jurisdiction." (Page 821), and stressed the federal legislative policy specifically providing the state courts with jurisdiction in such water rights cases.

In the instant case, however, the matter does not appear to fit within the three general categories for abstention set out in Colorado River. Neither are there present any exigent factors (such as federal legislation pushing forward state jurisdiction in the matter). Rather, the present case would appear to be a case wherein the exercise of federal jurisdiction appears appropriate and is in no significant way contraindicated by any federal judicial or legislative policy considerations.

This Court in Colorado River, in the majority opinion of Mr. Justice Brennan, pointed out that lower court abstention from the exercise of federal jurisdiction is the exception and not the rule (Page 813). The opinion goes on to quote from County of Alleghany v. Frank Mashuda Co. 360 U.S. 185, 188-189 (1959):

"The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception

to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest."

In the present case it appears that federal question jurisdiction exists, and that in any event diversity of citizenship jurisdiction also exists. Even if the federal question jurisdiction did not exist, it would appear that abstention was not justified; for diversity of citizenship jurisdiction also existed.

#### CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,  
LAWRENCE WILLIAM STEINBERG  
Counsel for Petitioner

## APPENDIX

**DO NOT PUBLISH**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

LAWRENCE S. KRAIN,

*Plaintiff-Appellant,*

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,  
a corporation; CHARLES YOUNG, individu-  
ally and as Chancellor of the University  
of California at Los Angeles; SHERMAN  
M. MELLINKOFF, individually and as Dean  
of the University of California at Los  
Angeles School of Medicine; DAVID H.  
SOLOMON, individually and as Chairman  
of the Department of Medicine of the  
University of California at Los Angeles  
School of Medicine; RONALD M. REISNER,  
individually and as Chairman of the Divi-  
sion of Dermatology at the University of  
California at Los Angeles Medical Center,  
*Defendants-Appellees.*

No. 75-2853

MEMORANDUM

[December 19, 1977]

Appeal from the United States District Court  
for the Central District of California

---

Before: TRASK and GOODWIN, Circuit Judges, and  
SOLOMON,\* District Judge.

Lawrence S. Krain appeals from a judgment of abstention  
entered by the District Court. We affirm.

---

\*Honorable Gus J. Solomon, Senior United States District Judge for  
the District of Oregon, sitting by designation.



Krain received an appointment as a resident at the University of California at Los Angeles School of Medicine (U.C.L.A.) for one year followed by an appointment for a second year; but he was not offered an appointment for a third year. Krain, with certificates of satisfactory completion of two years of residency from U.C.L.A., accepted a fellowship at Massachusetts General Hospital, but was later dismissed from this program.

Krain returned to California and filed a formal complaint with U.C.L.A. After extensive hearings in March and April 1974, a three-member hearing committee denied his application to be reinstated as a third year resident.

Krain filed an action in the Superior Court of Los Angeles on July 1, 1974. On a number of legal theories, Krain complained of acts leading up to his departures from U.C.L.A. and Massachusetts General Hospital and to U.C.L.A.'s refusal to reinstate him. The state court denied Krain's application for a preliminary injunction on July 26, 1974, and Krain appealed from the denial of this motion. On March 19, 1975, he filed a certificate of readiness for trial in the Superior Court.

On July 1, 1975, Krain filed this action.

The state and federal causes of action are substantially the same, and the parties are identical. What plaintiff calls a libel in his state court complaint, he calls a violation of his civil rights under 42 U.S.C. § 1983 in his federal complaint. In the only different cause of action in the federal complaint, Krain alleges a violation of the Family Educational and Privacy Rights Act of 1974, 20 U.S.C. § 1232g. Neither the language of the relevant section, 20 U.S.C. § 1232g(b)(1), nor the Act's legislative history, S.REP.No. 93-1206, 93rd Cong., 2nd Sess., reprinted in (1974) U.S. CODE CONG. & AD. NEWS 4206, 4250, support appellant's contention that the Act provides a private cause of action.

Because the concurrent state and federal proceedings involve identical parties and substantially similar claims and because Krain elected to file in the state court first, it was proper for the District Court to enter a judgment of abstention. *Weiner v. Shearson, Hammill & Co., Inc.*, 521 F.2d 817 (9th Cir. 1975). The Court in *Weiner* gave as its reasons for approving abstention:

"... the friction created by the appearance that the second court is interfering with the first; the waste of judicial resources caused by litigation in two courts; the unnecessary burden placed on already overcrowded dockets; the dual burden placed on litigants; and the possibility that dual litigation might involve the courts in an unseemly race to judgment . . . ." 521 F.2d at 820.

The pendency of a concurrent state proceeding will not justify abstention in all cases. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). But where the parties and claims in the concurrent state and federal cases are nearly identical, federalism, equitable principles and considerations of wise administration justify abstention. This is particularly true where, as here, the plaintiff in the federal case first chose the state forum and there have been no extensive proceedings in the federal forum. *Colorado River Water Conservation District v. United States*, *supra* at 817, 820; *Weiner v. Shearson, Hammill & Co., Inc.*, *supra* at 819-21.

The District Court was justified in entering a judgment of abstention, which judgment does not affect the merits of Krain's claims.

Affirmed.

**In the Supreme Court of the  
United States**

OCTOBER TERM, 1977

No. .... **77-1298**

LAWRENCE S. KRAIN,

*Petitioner,*

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, a corporation;

CHARLES YOUNG, individually and as Chancellor of the  
University of California at Los Angeles;

SHERMAN M. MELLINKOFF, individually and as Dean of the  
University of California at Los Angeles  
School of Medicine;

DAVID H. SOLOMON, individually and as Chairman of the  
Department of Medicine of the University of California  
at Los Angeles School of Medicine;

RONALD M. REISNER, individually and as Chairman of the  
Division of Dermatology of the University of California  
at Los Angeles Medical Center,

*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the  
Ninth Circuit

**Brief for Respondents in Opposition**

DONALD L. REIDHAAR

JAMES E. HOLST

GLENN R. WOODS

FRED TAKEMIYA

590 University Hall

2200 University Avenue

Berkeley, California 94720

*Counsel for Respondents*

Supreme Court, U. S.

**FILED**

**APR 17 1978**

MICHAEL RODAK, JR., CLERK

## INDEX

	Page
Opinion Below .....	2
Question Presented .....	2
Statement of the Case.....	2
Reasons for Denying the Writ.....	4
I. The Decision Below Is Entirely Consistent With This Court's Decision in Colorado River.....	4
II. The Decision Below Does Not Conflict With the Seventh Circuit's Decision in <i>Calvert</i> so as to Warrant Granting Certiorari.....	7
Conclusion .....	9

## AUTHORITIES

### CASES

### Pages

Calvert Fire Ins. Co. v. Will (7th Cir. 1977) 560 F.2d 792 .....	7, 8
Colorado River Water Cons. Dist. v. U.S. (1976) 424 U.S. 800 .....	4, 5, 6, 7, 8
Weiner v. Shearson, Hammill & Co., Inc. (9th Cir. 1975) 521 F.2d 817 .....	6

### STATUTES

15 United States Code section 78a (Securities Exchange Act of 1934, Rule 10b-5) .....	7
20 United States Code section 1232g (Family Educational Rights and Privacy Act of 1974) .....	3, 4, 9
42 United States Code section 1983 .....	4, 9
43 United States Code section 666 (McCarran Amendment) .....	5, 6

## In the Supreme Court of the United States

OCTOBER TERM, 1977

---

No. ....

---

LAWRENCE S. KRAIN,  
*Petitioner,*  
vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, a corporation;

CHARLES YOUNG, individually and as Chancellor of the  
University of California at Los Angeles;

SHERMAN M. MELLINKOFF, individually and as Dean of the  
University of California at Los Angeles  
School of Medicine;

DAVID H. SOLOMON, individually and as Chairman of the  
Department of Medicine of the University of California  
at Los Angeles School of Medicine;

RONALD M. REISNER, individually and as Chairman of the  
Division of Dermatology of the University of California  
at Los Angeles Medical Center,

*Respondents.*

---

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the  
Ninth Circuit

---

### Brief for Respondents in Opposition

---

Respondent Regents of the University of California,  
et al., oppose the petition of Lawrence S. Krain for a writ  
of certiorari to review the judgment and opinion of the



United States Court of Appeals for the Ninth Circuit entered in this case on December 19, 1977.

### **OPINION BELOW**

The memorandum opinion of the court of appeals appears in full in the Appendix of the petition for writ of certiorari.

### **QUESTION PRESENTED**

Did the United States District Court abuse its discretion by refraining to exercise concurrent jurisdiction where the plaintiff had elected to file suit in state court first, the parties were identical, no federal proceedings beyond the filing of the complaint had occurred, and all of plaintiff's causes of action in his federal suit had, in substance, been raised and were capable of being litigated in the state court?

### **STATEMENT OF THE CASE**

Petitioner is a former medical resident in the Division of Dermatology, University of California, Los Angeles, School of Medicine (UCLA). He was appointed as a Resident I for his first year on July 1, 1971 and reappointed on July 1, 1972 as a Resident II for a second year. However, due to serious problems with his clinical performance during his first two years, he was not offered a third year residency.

Petitioner then left UCLA and accepted a fellowship at Massachusetts General Hospital, but later, after being terminated from that appointment, renewed his complaints against UCLA. These complaints included his demand that he be given an administrative hearing to determine the propriety of UCLA's failure to appoint him as a third year resident. Such a hearing was held for five days in March and April of 1974, and the result was that the three

member hearing committee ruled that petitioner was not entitled to reinstatement as a third year resident.

On July 1, 1974, petitioner filed his complaint in Los Angeles Superior Court based upon a number of legal theories including alleged deprivation of due process and applied for a temporary restraining order to compel his readmission to UCLA as a medical resident and to prohibit certain alleged defamatory statements pending the outcome of the trial. On that date the application for the temporary restraining order was denied and a date set for hearing on his application for a preliminary injunction. After the hearing, the superior court denied the application for a preliminary injunction by order dated July 26, 1974 and on September 20, 1974 plaintiff appealed from that order.

While the appeal from the denial of his preliminary injunction was pending, petitioner proceeded with his action in the state trial court and, on March 19, 1975, filed a certificate of readiness summarizing the action as one for breach of contract, fraud, violation of civil rights, and injunction.

On July 1, 1975 the plaintiff filed the federal court action with which this petition for writ of certiorari is concerned. Petitioner requested relief on six counts: (1) declaratory judgment; (2) denial of civil rights; (3) taking of property without due process; (4) denial of equal protection of the laws; (5) violations of the Family Educational Rights and Privacy Act of 1974; and (6) injunction. After a hearing on July 2, 1975, the United States District Court for the Central District of California entered a judgment of abstention.

On July 30, 1975, petitioner filed his notice of appeal from the above judgment. He contended that the federal

action involved two issues not before the state court: the alleged denial of civil rights under 42 United States Code section 1983 and the alleged violations of the Family Educational Rights and Privacy Act of 1974, 20 United States Code section 1232g. Therefore, petitioner argued, the judgment of abstention should be reversed.

The Ninth Circuit Court of Appeals disagreed. The court found that petitioner had no private cause of action under the Family Educational Rights and Privacy Act of 1974, and that petitioner's claim of violation of his civil rights under 42 United States Code section 1983 was merely a different label for his state court libel claim. Accordingly, because the state and federal causes of action were substantially the same, identical parties were involved in both actions, and petitioner chose the state forum first, the circuit court, noting that the judgment did not affect the merits of petitioner's claim, affirmed the judgment of abstention on December 19, 1977.

It should also be noted that the state court action went to trial on October 31, 1975 and on March 4, 1976 judgment was entered in favor of all defendants on all causes of action. Petitioner's appeal from that judgment is pending at this time.

#### REASONS FOR DENYING THE WRIT

##### I. The Decision Below Is Entirely Consistent with This Court's Decision in *Colorado River*.

In *Colorado River Water Cons. Dist. v. U.S.* (1976) 424 U.S. 800, this Court held that in situations involving the contemporaneous exercise of state and federal jurisdiction not within one of the abstention doctrine categories, a federal court may refrain from exercising jurisdiction if considerations of wise judicial administration so warrant and the court has made a careful judgment considering its

obligation to exercise jurisdiction and the factors counseling against the exercise of jurisdiction. (*Id.*, at 817-818.)

This Court then proceeded to uphold the dismissal, by the United States District Court for the District of Colorado, of the government's suit seeking a declaration of its rights to certain state waters. At the time of dismissal a suit which had been filed in state court by one of the defendants in the federal action was still pending. This Court interpreted the McCarran Amendment, 43 United States Code section 666, as providing the states with jurisdiction concurrent with the federal courts to adjudicate both government and Indian water right claims. Given such concurrent jurisdiction, the court found that the McCarran Amendment's clear intent to avoid piecemeal adjudication of water rights where a comprehensive state system for such adjudication exists was the most important, but only one, of the "number of factors [that] clearly counsel against concurrent federal proceedings". (*Id.*, at 819.) The court also found "significant" the apparent absence of proceedings in the district court other than the complaint and motion to dismiss; the fact that the district court was some 300 miles away from the appropriate state court; the extensive involvement in the suit of state water rights; and the prior participation of the government in other state water division proceedings. (*Id.*, at 820.)

The holding of the court below in this case explicitly adopts the reasoning of *Colorado River*. Based on concepts of federalism, equitable principles, and considerations of wise judicial administration, the court held that "abstention" was proper because the concurrent federal and state proceedings involved identical parties and substantially similar claims, there had been no extensive proceedings in the federal court, and petitioner herein had voluntarily elected to file in the state court first. According



to *Colorado River*, the preceding factors are proper considerations for the court to weigh. The absence of extensive proceedings in the federal action was in fact one reason this Court sustained the dismissal in *Colorado River*. That the parties were identical and the claims substantially similar is reflective of this Court's concern in *Colorado River* that all claims be capable of adjudication in the state court action, as was the case after the McCarran Amendment had been construed. Furthermore, petitioner's election to file in the state court first is also a legitimate consideration. (*Id.*, at 818.) Finally, the language from *Weiner v. Shearson, Hammill & Co., Inc.* (9th Cir. 1975) 521 F.2d 817, quoted by the court below, indicates that the above factors were carefully weighed in light of principles of wise judicial administration.

Petitioner's argument that the decision below conflicts with *Colorado River* is not merely incorrect; it is also ill-conceived. It rests too heavily on the particular facts, and ignores the rationale of *Colorado River*. Petitioner appears to posit the need for an objective determination of whether abatement is appropriate in any given case. According to petitioner, abatement is justified only by the existence of "exigent factors (such as federal legislation pushing forward state jurisdiction in the matter)" or "federal judicial or legislative policy considerations" indicating a preference for state adjudication. (Petition at p. 13.) But the scheme thus presented suffers from two defects. *Colorado River* clearly upholds the use of a balancing test, and the McCarran Amendment policy was only one of a combination of factors that justified dismissal. In the court's own language,

"No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the com-

bination of factors counselling against that exercise is required." (*Colorado River, supra*, at 818, 819.)

**II. The Decision Below Does Not Conflict with the Seventh Circuit's Decision in Calvert so as to Warrant Granting Certiorari.**

In a recent decision for which this Court has granted certiorari, the Seventh Circuit Court of Appeals issued a writ of mandate ordering the district court to proceed with a suit which, with the exception of one cause of action, it had stayed in deference to a pending state court action between the same parties involving the same causes of action as those stayed in the federal suit. (*Calvert Fire Ins. Co. v. Will* (7th Cir. 1977) 560 F.2d 792, cert. granted, (January 10, 1978) 46 U.S.L.W. 3436. Calvert was a member of a reinsurance pool operated by American Mutual Reinsurance Company. Calvert attempted to rescind its membership agreement, prompting American Mutual to sue Calvert in state court, seeking a declaratory judgment that the pool arrangement was in full force and effect. Calvert answered, alleging violation of various federal and state securities laws as well as common law fraud. Simultaneously, Calvert counterclaimed for monetary damages, asserting as grounds for relief all defenses raised in its answer except Rule 10b-5 of the 1934 Securities Exchange Act. On the same day Calvert sued American in federal court seeking rescission of the pool agreement and monetary damages. The grounds for relief were those raised in its state court answer and counterclaim, with the additional assertion that American Mutual violated Rule 10b-5. American submitted a motion for abatement in the federal action which was granted as to all claims except that for money damages under Rule 10b-5. Calvert sought a writ

of mandate ordering the district court to proceed with the action. The court of appeals ordered that the writ issue.

Applying this Court's decision in *Colorado River* to the above facts, the court in *Calvert* held that the exceptional circumstances justifying dismissal<sup>1</sup> of the federal suit did not exist:

"The federal forum was not inconvenient for the parties, and the state court did not obtain concurrent jurisdiction before the federal court since the counterclaim and the federal action were filed on the same day. Piecemeal litigation can best be avoided by the federal court, which has exclusive jurisdiction over the Rule 10b-5 claim. Finally, the strong federal interest in the regulation of securities and the grant of exclusive jurisdiction in the federal courts to adjudicate claims under the Securities Exchange Act of 1934 are compelling factors which weigh heavily against deference to state proceedings." (*Calvert, supra*, at 796.)

In the absence of a conflict between the decisions of the court below and *Calvert*, the mere fact that certiorari has been granted in *Calvert* is insufficient reason to grant certiorari in this case. At the risk of being repetitive, in this case petitioner selected the state forum first and identical and duplicate litigation was avoided by abstention at an early stage in the federal action. All of petitioner's claims can be resolved in the state forum and, unlike *Calvert*, piecemeal litigation was best avoided by the lower

1. That the district court's order was phrased in terms of "staying" the action was deemed an unimportant distinction by the appellate court, since the effect "was to preclude federal resolution of Calvert's federal claims, making the order equivalent to a dismissal for purposes of this case." (*Id.*, at 796). The district court in this case neither dismissed the action nor made any ruling on the merits. It simply refrained from exercising its jurisdiction and held the case in abeyance.

court's abstention. Analytically, both courts weighed a variety of factors, all of which were deemed appropriate considerations in *Colorado River*, in determining whether the federal court's deference to the state court was proper. That the outcome of such a "weighing" process involving different facts resulted in the decisions discussed above is not surprising and can hardly be termed a conflict between the Seventh and Ninth Circuits as petitioner asserts.

### CONCLUSION

The decision of the lower court is clearly correct. As noted by the circuit court, what the petitioner called a libel in his state court complaint in July of 1974, a year later in his federal suit he called a violation of his civil rights under 42 United States Code section 1983. Additionally, in the only different cause of action in the federal complaint regarding a claimed violation of the Family Educational Rights and Privacy Act of 1974, there is no private right of action.

For all of the reasons stated herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

DONALD L. REIDHAAR  
JAMES E. HOLST  
GLENN R. WOODS  
FRED TAKEMIYA  
590 University Hall  
2200 University Avenue  
Berkeley, California 94720

*Counsel for Respondents*